IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 61566-1-I
v.	)	UNPUBLISHED OPINION
BRIAN TURNER, Appellant.	)	FILED: July 20, 2009

Schindler C.J. — Turner appeals his conviction as an accomplice of delivery of a substance in lieu of a controlled substance in violation of RCW 69.50.4012. Turner argues that knowledge of the nature of the substance is an essential element of the crime of delivery of a substance in lieu of a controlled substance. While the State has the burden of proving beyond a reasonable doubt that Turner facilitated the sale of a controlled substance, to convict Turner as an accomplice under RCW 69.50.4012, the State has no burden to prove Turner knew the substance he delivered was an uncontrolled substance. We affirm.

On the afternoon of September 30, 2007, Seattle Police Department (SPD) Detective Ronald Brundage was acting as an undercover buyer with the Anti-Crime Team near the Pike Place Market. Brian Turner approached Brundage and asked him whether he "wanted black."[1] Brundage told Turner he did. Turner then directed

Brundage to follow him. When they reached the bus stop at the corner of Pike Street and Fourth Avenue, Turner instructed a woman, Amelia Traut, to "sell him the black."[1] Traut produced a dark object wrapped in white plastic. Brundage said the object appeared to be tar heroin. Traut asked Brundage if he wanted "twenty." Brundage said yes and pulled out a $20 bill. Brundage would not give Traut the money until she gave him the heroin, but Traut demanded that Brundage give her the money first. Turner interjected, and he impatiently told Traut to "give it to him." Traut apologized and handed Brundage the dark object wrapped in plastic. Brundage gave Traut the $20.

Seattle Police Department Officers arrested Turner and Traut. The Washington State Crime Lab tested the dark object that Brundage purchased and concluded it did not contain any controlled substances.

The State charged Turner as an accomplice with one count of delivery of a substance in lieu of a controlled substance in violation of RCW 69.50.4012. Turner did not testify at trial. Turner did not object to the jury instructions. The "to convict" instruction states:

> To convict the defendant of the crime of delivery of a material in lieu of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 30, 2007, the defendant knowingly offered, arranged or negotiated for the delivery or sale of a controlled substance;
>
> (2) That the defendant delivered an uncontrolled substance

[1] "'Black' is a common term for tar heroin."

in lieu of a controlled substance; and
(3) That the acts occurred in the State of Washington.

The accomplice liability instruction states in pertinent part:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) Solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) Aids or agrees to aid another person in planning or committing the crime.

In closing, the State focused on the "to convict" jury instruction. The prosecutor pointed out there was no dispute that Turner knowingly offered, arranged, or negotiated for the sale of a controlled substance. The defense attorney focused almost exclusively on the accomplice liability instruction to argue that the jury had to "find Mr. Turner acted with knowledge that the substance was not heroin, that it was in fact bunk. And there is no evidence whatsoever that that is present." In rebuttal, the State reiterated that the "to convict" instruction did not require the State to prove that the substance delivered was heroin. The jury convicted Turner.

On appeal, Turner again argues that there was no evidence he acted with knowledge that the substance delivered was an uncontrolled substance. Turner asserts that in order to establish accomplice liability, the State must prove that he knew the nature of the substance delivered. Neither the statute defining the elements of the crime of delivery of a substance in lieu of a controlled substance nor case law supports Turner's assertion that knowledge of the nature of the substance delivered is necessary to convict him as an accomplice under RCW 69.50.4012.

The State has the burden of proving the essential elements of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). In order to establish accomplice liability, the State must prove that the accomplice "acted with knowledge that his conduct would promote or facilitate *the* crime for which he is eventually charged." State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2000); RCW 9A.08.020.

The premise of Turner's argument is that in order to convict him as an accomplice of delivery of a substance in lieu of a controlled substance, the State must prove he knowingly facilitated the delivery of an uncontrolled substance. There is no dispute that the State proved beyond a reasonable doubt that Turner acted as an accomplice in facilitating the sale of a controlled substance to Detective Brundage, but the State did not present any evidence that Turner knew he facilitated the delivery of an uncontrolled substance.

Under RCW 69.50.4012, in order to convict a defendant of delivery of a substance in lieu of a controlled substance, the State must prove beyond a reasonable doubt that:

> (1) The defendant offered, arranged, or negotiated for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to a person, and then;
> (2) Sold, gave, delivered, dispensed, distributed, or administered to that person any other liquid, substance, or material in lieu of such controlled substance.

If a statute's meaning is plain on its face, we give effect to that plain meaning. State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The plain language of RCW 69.50.4012 unambiguously requires the State to establish that the defendant arranged to sell a controlled substance and then delivered an uncontrolled substance. State v. Eddie A., 40 Wn. App. 717, 718, 700 P.2d 751 (1985). RCW 69.50.4012 does not require the State to prove the defendant acted with knowledge that the material delivered was an uncontrolled substance.

Case law also does not support Turner's argument. In State v. Wilson, 95 Wn.2d 828, 631 P.2d 362 (1981), the Washington State Supreme Court addressed the exact same argument Turner makes. In Wilson, the defendant Wilson sold a jar of "speed" to an undercover Washington State Patrol Drug Assistance Unit agent and then delivered an uncontrolled substance. Wilson, 95 Wn.2d at 829. On appeal, Wilson argued that "guilty knowledge" of the nature of the material is an element of delivery of a substance in lieu of a controlled substance under former RCW 69.50.401(c).[2] Wilson, 95 Wn.2d at 834. The Court rejected Wilson's argument and held that the State need not prove knowledge of the nature of the substance delivered. Wilson, 95 Wn.2d at 834. In reaching that conclusion, the Court explained:

> It is impossible for one to contract for the delivery of a controlled substance without knowing what he is doing, since to contract involves an intentional act. When a party has entered into such a contract and then makes a delivery in compliance with the agreement, he is guilty of delivery of a controlled substance.

[2] RCW 69.50.4012 is identical to former RCW 69.50.401(c). RCW 69.50.4012 was enacted in an effort to reorganize criminal statutes within the Revised Code of Washington. Laws of 2003, Ch. 53, § 1 ("It is not intended that this act effectuate any substantive changes to any criminal provision in the Revised Code of Washington").

> The legislature . . . was concerned with the conduct of contracting to deliver a controlled substance and thereafter making a delivery, ostensibly pursuant to that contract. Even though the accused may have delivered a substitute substance, thinking it was the one contracted for, his culpability would be no less, for in either case it was his intent to violate the law.
>
> Consequently, we cannot agree that knowledge of the nature of the substance delivered is an element which the State must prove in a prosecution under this section.

Wilson, 95 Wn.2d at 834. See also State v. Prather, 30 Wn. App. 666, 668, 638 P.2d 95 (1981) (a defendant's knowledge of the nature of the substance delivered is not an element of the offense of delivery of a substance in lieu of a controlled substance); State v. Lauterbach, 33 Wn. App. 161, 164, 653 P.2d 433 (1982) (it is immaterial whether the defendant knew or did not know that the substance ultimately delivered was *not* a controlled substance).

Because knowledge of the nature of the substance is not an essential element of the crime of delivery of a substance in lieu of a controlled substance under RCW 69.50.4012, the State proved the essential elements beyond a reasonable doubt.

Additional Grounds for Review

In the statement of additional grounds for review, Turner argues that (1) his attorney provided ineffective assistance, (2) the prosecutor committed misconduct during closing argument, and (3) the court erred in failing to consider a Drug Offender Sentencing Alternative (DOSA).

Turner contends that his attorney provided ineffective assistance by not calling either Traut or him to testify at trial and failing to object to the prosecutor's misstatements of law and improper jury instructions. To establish ineffective assistance of counsel, Turner must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to satisfy either part of the test, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). In reviewing ineffective assistance of counsel claims, appellate courts indulge in a strong presumption that counsel effectively represented the defendant. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, the defendant must show there were no legitimate strategic or tactical reasons for the challenged conduct. Id. at 336. Turner does not show an absence of legitimate strategic or tactical reasons. Turner also does not show prejudice by his counsel's decision not to call either Traut or him to testify at trial. And as previously discussed, neither the prosecutor nor the jury instructions misstated the law.

Turner next argues that the prosecutor committed misconduct during closing argument by allegedly making disparaging remarks. Turner fails to show how he was prejudiced by any remarks made during closing. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

Turner also asserts that the court erred in failing to consider a DOSA. Turner

had an offender score of four based on prior felony convictions for unlawful possession of a firearm in the first degree, assault in the third degree, attempted burglary in the second degree, and vehicular assault.[3] With an offender score of four, the standard sentence range was 20+ to 60 months. The court sentenced Turner to a low-end standard range sentence of 24 months. Turner did not request a DOSA. In State v. Smith, 142 Wn. App. 122, 129, 173 P.3d 973 (2007), this court held that, "even if a defendant is eligible for DOSA, the decision to impose DOSA rests in the sentencing courts' discretion." Turner fails to show that the court abused its discretion in deciding not to impose a DOSA.

We affirm.

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.

Ajid, J.

[3] A defendant is ineligible for DOSA if he has committed a violent offense. RCW 9.94A.660(a). A class A felony and a vehicular assault while under the influence of an intoxicating liquor or drug are "violent offenses." RCW 9.94A.030(54)(a)(i), (xiii).